

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
CONSTRUCTION INDUSTRY LICENSING )  
BOARD )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 97-1434  
 )  
EARL G. BURKS, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a Section 120.57(1) hearing was held in this case on October 28, 1997, by video teleconference at sites in Miami and Tallahassee, Florida, before Stuart M. Lerner, a duly designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Theodore R. Gay, Senior Attorney  
Seymour Stern, OPS Attorney  
Department of Business and  
Professional Regulation  
401 Northwest Second Avenue, Suite N-607  
Miami, Florida 33128

For Respondent: Earl G. Burks, pro se  
12350 Southwest 132nd Court, No. 205  
Miami, Florida 33186

STATEMENT OF THE ISSUES

1. Whether Respondent committed the violations alleged in the Administrative Complaint.

2. If so, what punitive action should be taken against Respondent.

PRELIMINARY STATEMENT

On September 25, 1996, the Department of Business and Professional Regulation (Department) issued an Administrative Complaint against Respondent. Paragraphs 1 through 16 of the Administrative Complaint alleged the following:

1. Petitioner is the state agency charged with regulating the practice of contracting pursuant to Section 20.165, Florida Statutes, and Chapters 455 and 489, Florida Statutes.
2. Respondent is, and has been at all times material hereto, a Certified General Contractor, in the State of Florida, having been issued license number CG C047384.
3. Respondent's last known address is 12350 S.W. 132nd Court, Miami, FL 33186.
4. At all times material hereto, Respondent (hereinafter referred to as "Contractor") was the licensed qualifier for ANAC Services, Inc., and was therefore responsible for the acts, omissions, and financial responsibility of the business as it relates to contracting.
5. On or about February 24, 1994, Respondent entered into a verbal contract with Erycina Webbe (hereinafter referred to as "Webbe") to negotiate an insurance settlement and reconstruct Webbe's fire damaged home located at 5510 N.W. 10th Avenue, Miami, FL 33127.
6. The verbal contract price was to be the entire insurance settlement which was \$35,658.38.
7. Respondent received \$30,658.38 of the total contract price.
8. Respondent did not obtain a permit from the Metro-Dade County Building Department.

9. Said construction began in or around April, 1994, for about one-half day, at which time Respondent ceased all construction activities without just cause or notification to Webbe.

10. At the time construction ceased, Respondent had completed considerably less than the agreed verbal contract price.

11. Respondent was not entitled to retain said excess funds.

12. Respondent failed to refund or otherwise reimburse Webbe.

13. On November 28, 1995, Respondent and Webbe entered into a mediation agreement for which Respondent agreed to a judgment against him for \$47,377.30 if he failed to recommence construction on Webbe's residence including obtaining building permits and receiving a Certificate of Occupancy, and paying the remainder of the money owed to Webbe within thirty (30) days after completion of said construction.

14. Respondent failed to comply with the terms of the Mediation Agreement.

15. On July 5, 1996, Webbe obtained a Final Judgment in the amount of \$44,877.30 against Respondent in Case Number 95-9669 CA 01, In The Circuit Court Of The 11th Judicial Circuit, In And For Dade County, Florida.

16. Respondent has failed to comply with the terms of said judgment.

The Administrative Complaint further alleged that, based upon the allegations of fact set forth in paragraphs 1 through 16, Respondent was guilty of violating the following subsections of Section 489.129, Florida Statutes: subsection (1)(h)2 (Count I);

subsection (1)(k) (Count II); subsection (1)(n) (Count III);  
subsection (1)(p) (Count IV); and subsection (1)(r) (Count V).

Respondent subsequently requested a Section 120.57(1) hearing on the allegations made in the Administrative Complaint. On March 21, 1997, the matter was referred to the Division of Administrative Hearings for the assignment of an administrative law judge to conduct the Section 120.57(1) hearing Respondent had requested.

As noted above, the hearing was held on October 28, 1997.<sup>1</sup> Two witnesses testified at the hearing. Erycina Webbe, the homeowner referenced in the Administrative Complaint, testified for the Department. Respondent testified in his own defense. In addition to Webbe's and Respondent's testimony, 17 exhibits (Petitioner's Exhibits 1 through 8, 10, and 11, and Respondent's Exhibits 1 through 7) were offered and received into evidence.

At the conclusion of the evidentiary portion of the hearing, the undersigned, on the record, announced that proposed recommended orders had to be filed no later than November 17, 1997. The Department and Respondent filed their proposed recommended orders on November 17, 1997, and November 18, 1997, respectively. The parties' proposed recommended orders have been carefully considered by the undersigned.

#### FINDINGS OF FACT

Based upon the evidence adduced at hearing, and the record as a whole, the following findings of fact are made:

1. Respondent is a general contractor.
2. He is now, and has been at all times material to the instant case, licensed to engage in the contracting business in the State of Florida.
3. He has held license number CG C047384 since 1989.
4. Respondent is now, and has been since December 14, 1992, the primary qualifying agent for ANAC Services, Inc. (ANAC), a contracting business owned by Respondent and located in Miami, Florida.
5. Erycina Webbe is a retired educator. She is now, and has been for approximately the past 30 years, the owner of a residence located at 5510 Northwest 10th Avenue in Miami, which she uses as rental property (Rental Property).
6. In January of 1994, the Rental Property was extensively damaged by fire. At the time, the tenants of the Rental Property were Michelle Pogue and Vanessa Bartlett. Pogue and Bartlett are Webbe's nieces. After the fire, Pogue and Bartlett had to move out because the Rental Property was not in livable condition.
7. Webbe was insured against damage to the Rental Property caused by fire. She therefore filed a claim with her insurer seeking payment for the loss she suffered as a result of the fire that damaged the Rental Property.
8. An insurance adjuster hired by Webbe's insurer initially

estimated that Webbe was due \$27,678.29 under her insurance policy for the damage to the Rental Property.

9. Webbe thereafter contacted Respondent and discussed with him the possibility of her hiring him to repair the Rental Property.

10. During the discussion, Respondent offered to help Webbe obtain a larger insurance settlement than the \$27,678.29 her insurer had proposed to pay her.

11. Respondent, as promised, provided such assistance.

12. Webbe's insurer ultimately paid \$35,658.38 in settlement of Webbe's claim. Such payment was made by check dated January 31, 1994 (Settlement Check).

13. The Settlement Check was made payable to Webbe and ANAC.

14. On or about February 24, 1994, Webbe met Respondent at a branch of the Great Western Bank, where ANAC maintained an account. Webbe had with her the Settlement Check. She endorsed the check and then gave it to Respondent, who deposited it in ANAC's account at the bank. At the time of the deposit, the account had a balance of \$200.00. After the deposit was made, Respondent, with the approval of the bank officer, withdrew \$10,000.00 from the account, \$5,000.00 of which Respondent gave to Webbe.

15. In endorsing the Settlement Check and giving it to Respondent for deposit in ANAC's account, Webbe was fulfilling

her obligation under a verbal agreement (Contract) with Respondent (acting on behalf of ANAC) to pay for the repairs that, pursuant to the terms of the Contract, ANAC was to make to the Rental Property (Project).

16. The Contract price for the Project was the amount of the Settlement Check, less \$5,000.00.

17. Respondent (on behalf of ANAC) agreed to start the Project no later than March 28, 1994, and to complete it no later June 28, 1994.

18. A building permit from the City of Miami was needed before work on the project could begin. Respondent asked Webbe to fill in her name, her address, and the address of the Rental Property on a City of Miami building permit application form and to sign the form. Webbe did so on March 29, 1994. She then returned the form to Respondent for him to complete and submit to the City of Miami.

19. Webbe did not agree to assume the responsibility of obtaining the permit needed to begin the Project.

20. The responsibility, under the Contract, remained ANAC's.<sup>2</sup>

21. ANAC, however, did not obtain the permit, and the deadline for the completion of the Project passed without any Project work having been done.

22. Webbe retained the services of an attorney to assist her in her efforts to have ANAC fulfill its contractual

obligation to complete the Project.

23. Webbe's attorney contacted Respondent.

24. Respondent (on behalf of ANAC) thereafter sent Webbe a document entitled "Addendum to Contract between Mrs. Erycina R. Webbe and ANAC Services, Inc." The document, which was signed by Respondent and dated October 3, 1994, read as follows:

We hereby propose to start the reconstruction project at 5510 N.W. 10th Avenue no later than November 15, 1994. This project is to be completed by February 15, 1995.

ANAC Services Inc. will compensate Mrs. Webbe for loss [of] rent and the amount [will] be mutually agreed upon by both parties.

25. ANAC did not complete the Project by February 15, 1994. In fact, no work had been done as of that date.

26. There was no just cause for the delay in the commencement of the Project.

27. On May 12, 1995, Webbe (through her attorney) filed a complaint in Dade County Circuit Court (in Case No. 95-9669 CA 01), seeking a judgment for damages, plus interest and costs, against ANAC and Respondent for breach of contract, conversion, civil theft, and unjust enrichment.

28. Respondent was served with a copy of the complaint. He responded to the complaint by submitting the following written answer:

My written defense to the above summons is that I'd like to complete t[he] construction work @ Mrs. Webbe['s] residence if she would allow us. And the amount of money is \$30,000.00 dollars not \$35,000.00 as to the



contract amount.<sup>3</sup> Mr. Jacobi [Webbe's attorney] please work out a settlement arrangement.

29. Webbe (along with her attorney) and Respondent (who was not represented by counsel) participated in a court-ordered mediation conference that was held on November 28, 1995.

30. At the mediation conference, the parties entered into a Mediation Agreement settling their dispute. The Mediation Agreement was signed by Webbe and Respondent (in his individual capacity and in his capacity as President of ANAC). It read as follows:

THE PARTIES have agreed to abide by the following:

1. The Defendants agree to a Judgment against them, jointly and severally, in the amount of Forty-seven Thousand Seventy-seven and 30/100 (Dollars).

2. Said Judgment shall be recorded upon the filing of an Affidavit of Non-Compliance filed by the Plaintiff as to any of the following events:

a) If the Defendants do not commence construction on the property located at 5510 N.W. Tenth Avenue, Miami, FL 33127, pursuant to the attached Contract Proposal, on or before January 1, 1996;

b) If the Defendants do not pay Two Thousand Five Hundred and No/100 (\$2,500.00) Dollars to the Plaintiff on or before January 1, 1996; or

c) If the Defendants do not complete the aforementioned construction on or before March 31, 1996.

3. Defendants shall be responsible for compliance with the pulling of all permits

and securing a Certificate of Occupancy within said time period.

4. Upon proper completion [of] the work, including Certificate of Occupancy and clearance of all violations presently on the property, if any, Defendants will receive a credit in the amount of Thirty-five Thousand Six Hundred Fifty-eight and 38/100 (\$35,658.38) Dollars.

a) If work is complete by completion date, as specified above, Defendants will receive and additional credit of Four Thousand Five Hundred and No/100 (\$4,500.00) Dollars against said Judgment.

b) The Defendants will have thirty (30) days in order to pay the remainder of the amount owed to Plaintiff.

c) If payment is not made within thirty (30) days Plaintiff will apply for a Judgment by Affidavit of Non-Compliance.

5. Each party shall bear their own costs and fees.

31. The "attached Contract Proposal" (referred to paragraph 2a of the Mediation Agreement) provided, in pertinent part, as follows:

We hereby propose to furnish the materials and labor necessary for the completion of the following:

EXTERIOR ROOF  
Description

R/R/ damaged sheathing  
Re-roof damaged roofing/shingles  
Chem. clean soffit/repaint

EXTERIOR FRONT

## Description

Clean pressure wash exterior; seal or prime  
then paint with two finish coats  
Paint exterior fascia/soffit  
R/R ornamental iron- security grill door  
R/R exterior door  
Paint door exterior, per side  
Paint door trim and jamb, per side

## EXTERIOR RIGHT SIDE

### Description

Stucco or exterior plaster repair  
Clean stucco  
Paint stucco  
R/R two exterior doors @ utility room and  
kitchen

## EXTERIOR REAR

### Description

Stucco or exterior plaster repair  
Clean/paint stucco  
Re-establish location of cable wires  
R/R aluminum windows- 2 each  
Install/paint baseboards  
Replace interior door unit  
Paint door/trim and jamb  
Replace closet door  
Paint closet door  
Seal then paint the walls and ceiling  
twice (3 coats)  
Install rod in closet  
Install carpet/tile as per owner's  
specifications

ROOM: BEDROOM NO. 3/CLOSET  
DESCRIPTION

R/R ceiling/wall drywall- hung, taped, light  
texture, ready for paint  
install Batt insulation  
R/R aluminum windows- 2 each  
Install/paint baseboards  
Replace interior door unit  
Paint door/trim and jamb  
Replace closet door  
Seal then paint the walls and ceiling  
twice (3 coats)  
Install rod in closet  
Install carpet/tile as per owner's  
specifications

EXTERIOR LEFT SIDE  
Description

Clean/paint stucco  
R/R damaged storm shutter

ROOM: BEDROOM NO. 1/CLOSET  
DESCRIPTION

Install Batt insulation  
R/R ceiling drywall- hung taped, light  
texture, ready for paint  
Chem. clean window  
Seal then paint the walls and ceiling  
twice (3 coats)  
R/R interior door unit  
Paint door/trim and jamb  
R/R bi-fold closet door  
Paint door  
Install carpet/tile as per owner's  
specifications

ROOM: BEDROOM NO. 2/CLOSET  
Description

R/R ceiling/wall drywall- hung taped, light  
texture, ready for paint  
Install Batt insulation

ROOM: HALL/CLOSET  
Description

Chem. clean/seal then paint the walls and

ceiling twice (3 coats)  
Install carpet/tile as per owner's  
specifications  
Install Batt insulation

ROOM: HALL BATH  
Description

Chem. clean tub  
Chem. clean toilet  
R/R toilet seat  
Chem. clean sink/faucet  
Seal/paint walls/ceilings  
Chem. clean window  
Chem. clean tile/grout  
Paint int. door/frame  
R/R tub/shower door  
Install Batt insulation

ROOM: KITCHEN  
Description

Seal then paint the walls and ceiling  
twice (3) coats  
R/R cabinetry- lower base units  
R/R cabinetry- upper wall units  
R/R countertop- flat laid formica  
R/R sink/faucet  
Install Batt insulation

ROOM: LIVING ROOM/DINING ROOM  
Description

Seal then paint the walls and ceiling  
twice (3) coats  
Chem. clean aluminum windows  
Install carpet/tile as per owner's  
specifications

MISCELLANEOUS  
Description

R/R damaged main entrance panel  
Upgrade electrical system to current S.F.B.C.  
standards  
Complete construction clean-up and debris  
removal.

32. Respondent paid Webbe \$2,500.00 in accordance with paragraph 2b of the Mediation Agreement.

33. Although work on the Project (as described in the "Contract Proposal" attached to the Mediation Agreement) began

prior to January 1, 1996, as required by paragraph 1a of the

Mediation Agreement, the Project was not finished, or even near completion, as of June 25, 1996.

34. On that date, Webbe executed an Affidavit of Non-Compliance, in which she asserted the following:

1. A Mediation Agreement was executed by the parties.
2. Pursuant to said Agreement, Defendants were to complete work by March 31, 1996.
3. No work is being done on the property and said construction is not completed.
4. Defendants owe Plaintiff the amount of Forty-four Thousand Eight Hundred Seventy-seven and 30/100 (\$44,877.30) Dollars.

35. Webbe filed this Affidavit of Non-Compliance in Dade County Circuit Case No 95-9669 CA 01 on June 28, 1996.

36. On July 5, 1996, Dade County Circuit Court Judge Ronald Friedman entered a Final Judgment in Dade County Circuit Case No 95-9669 CA 01, which provided as follows:

THIS CAUSE having been agreed to by the parties, pursuant to a Mediation Agreement, and after being duly advised in the premises, it is hereby,

ORDERED AND ADJUDGED:

That the Defendants ANAC SERVICES, INC., AND EARL G. BURKS, are hereby ordered to pay to the Plaintiff, ERYCINA WEBBE, the amount of Forty-four Thousand Eight Hundred Seventy-seven and 30/100 (\$44,877.30) Dollars for all of which let execution issue.

A copy of the Final Judgment was furnished Respondent and ANAC.

37. The Final Judgment entered in Dade County Circuit Case No 95-9669 CA 01 was not appealed, and it has not been vacated, set aside, discharged, or fully satisfied.

38. ANAC has performed only a portion of the repair work it agreed (through Respondent) to perform (and was paid in full to perform) for Webbe.<sup>4</sup>

39. At least some of the work was performed without the appropriate building permit first having been obtained.

40. A building permit for the Project was first obtained in May of 1997.

41. It was obtained by Webbe, after she had received several code violation notices for unpermitted work on the Rental Property.

42. Webbe has had to spend approximately \$20,000.00 (in addition to what she paid ANAC) to pay for repairs that ANAC was supposed to make under the Contract.

43. The Rental Property is now in rentable condition, although all of the repairs that ANAC (through Respondent) agreed to make have yet to be made.

44. The Rental Property has been rented and occupied since August 14, 1997.

45. Other than the \$2,500.00 payment made in accordance with paragraph 2b of the Mediation Agreement, Webbe has not been refunded any of the Contract Price.<sup>5</sup>

CONCLUSIONS OF LAW



46. The Department has been vested with the statutory authority to issue licenses to those qualified applicants seeking to engage in the building contracting business in the State of Florida. Section 489.115, Florida Statutes.

47. A business entity, like ANAC, may obtain such a license, but only through a licensed "qualifying agent." Section 489.119, Florida Statutes.

48. There are two types of "qualifying agents": "primary qualifying agents," and "secondary qualifying agents."

49. A "primary qualifying agent" is defined in subsection (4) of Section 489.105, Florida Statutes, as follows:

"Primary qualifying agent" means a person who possesses the requisite skill, knowledge, and experience, and has the responsibility to supervise, direct, manage and control the contracting activities of the business organization with which he is connected; who has the responsibility to supervise, direct, manage, and control construction activities on a job for which he has obtained the building permit; and whose technical and personal qualifications have been determined by investigation and examination as provided in this part, as attested by the [D]epartment.

50. A "secondary qualifying agent" is defined in subsection (5) of Section 489.105, Florida Statutes, as follows:

"Secondary qualifying agent" means a person who possesses the requisite skill, knowledge, and experience, and has the responsibility to supervise, direct, manage, and control construction activities on a job for which he has obtained a permit, and whose technical and personal qualifications have been

determined by investigation and examination as provided in this part, as attested by the [D]epartment.

51. The "responsibilities" of "qualifying agents" are further described in Section 489.1195, Florida Statutes, which provides, in pertinent part, as follows:

(1) A qualifying agent is a primary qualifying agent unless he is a secondary qualifying agent under this section.

(a) All primary qualifying agents for a business organization are jointly and equally responsible for supervision of all operations of the business organization; for all field work at all sites; and for financial matters, both for the organization in general and for each specific job. . . .

52. The Construction Industry Licensing Board (Board) may take any of the following punitive actions against a contractor serving as the "primary qualifying agent" for a business entity if (a) an administrative complaint is filed alleging that the contractor or the business entity committed any of the acts proscribed by Section 489.129(1), Florida Statutes, and (b) it is shown that the allegations of the complaint are true: revoke or suspend the contractor's license; place the contractor on probation; reprimand the contractor; deny the renewal of the contractor's license; impose an administrative fine not to exceed \$5,000.00 per violation; require financial restitution to the victimized consumer(s); require the contractor to take continuing education courses; or assess costs associated with the Department's investigation and prosecution. Proof greater than a

mere preponderance of the evidence must be submitted. Clear and convincing evidence of the contractor's guilt is required. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); McKinney v. Castor, 667 So. 2d 387, 388 (Fla. 1st DCA 1995); Tenbroeck v. Castor, 640 So. 2d 164, 167 (Fla. 1st DCA 1994); Nair v. Department of Business and Professional Regulation, 654 So. 2d 205, 207 (Fla. 1st DCA 1995); Pic N' Save v. Department of Business Regulation, 601 So. 2d 245 (Fla. 1st DCA 1992); Munch v. Department of Professional Regulation, 592 So. 2d 1136 (Fla. 1st DCA 1992); Newberry v. Florida Department of Law Enforcement, 585 So. 2d 500 (Fla. 3d DCA 1991); Pascale v. Department of Insurance, 525 So. 2d 922 (Fla. 3d DCA 1988); Section 120.57(1)(h), Florida Statutes ("Findings of fact shall be based on a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute."). "[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be

established.'" In re Davey, 645 So. 2d 398, 404 (Fla. 1994), quoting, with approval, from Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983). Furthermore, the punitive action taken against the contractor may be based only upon those offenses specifically alleged in the administrative complaint. See Cottrill v. Department of Insurance, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996); Chrysler v. Department of Professional Regulation, 627 So. 2d 31 (Fla. 1st DCA 1993); Klein v. Department of Business and Professional Regulation, 625 So. 2d 1237, 1238-39 (Fla. 2d DCA 1993); Arpayoglou v. Department of Professional Regulation, 603 So. 2d 8 (Fla. 1st DCA 1992); Willner v. Department of Professional Regulation, Board of Medicine, 563 So. 2d 805, 806 (Fla. 1st DCA 1992); Celaya v. Department of Professional Regulation, Board of Medicine, 560 So. 2d 383, 384 (Fla. 3d DCA 1990); Kinney v. Department of State, 501 So. 2d 129, 133 (Fla. 5th DCA 1987); Sternberg v. Department of Professional Regulation, 465 So. 2d 1324, 1325 (Fla. 1st DCA 1985); Hunter v. Department of Professional Regulation, 458 So. 2d 842, 844 (Fla. 2d DCA 1984).

53. The Administrative Complaint issued in the instant case alleges that punitive action should be taken against Respondent for violations of Section 489.129(1)(h)2, Florida Statutes (Count I), Section 489.129(1)(k), Florida Statutes (Count II), Section 489.129(1)(n), Florida Statutes (Count III), Section 489.129(1)(p), Florida Statutes (Count IV) and Section

489.129(1)(r), Florida Statutes (Count V), which were committed in connection with a residential construction project that ANAC (through Respondent) agreed to undertake for Erycina Webbe at a time when Respondent was ANAC's primary qualifying agent.

54. At all times material to the instant case, Section 489.129(1)(h)2, Florida Statutes, has authorized the Board to take punitive action against a contractor if the contractor or the business entity for which the contractor is a primary qualifying agent:

Commit[s] mismanagement or misconduct in the practice of contracting. Financial mismanagement or misconduct occurs when: . . .

2. The contractor has abandoned a customer's job and the percentage of completion is less than the percentage of the total contract price paid to the contractor as of the time of abandonment, unless the contractor is entitled to retain such funds under the terms of the contract or refunds the excess funds within 30 days after the date the job is abandoned.

55. At all times material to the instant case, Section 489.129(1)(k), Florida Statutes, has authorized the Board to take punitive action against a contractor if the contractor or the business entity for which the contractor is a primary qualifying agent:

Abandon[s] a construction project in which the contractor is engaged or under contract as a contractor. A project may be presumed abandoned after 90 days if the contractor terminates the project without just cause or without proper notification to the owner, including the reason for termination, or

fails to perform work without just cause for 90 consecutive days.

56. At all times material to the instant case, Section 489.129(1)(n), Florida Statutes, has authorized the Board to take punitive action against a contractor if the contractor or the business entity for which the contractor is a primary qualifying agent "[c]ommit[s] incompetency or misconduct in the practice of contracting."

57. At all times material to the instant case, Section 489.129(1)(p), Florida Statutes, has authorized the Board to take punitive action against a contractor if the contractor or the business entity for which the contractor is a primary qualifying agent "[p]roceeds on any job without obtaining applicable local building department permits and inspections."

58. At all times material to the instant case, Section 489.129(1)(r), Florida Statutes, has authorized the Board to take punitive action against a contractor if the contractor or the business entity for which the contractor is a primary qualifying agent:

Fail[s] to satisfy within a reasonable time, the terms of a civil judgment obtained against the licensee, or the business organization qualified by the licensee, relating to the practice of the licensee's profession.

59. The failure to satisfy a civil judgment in violation of Section 489.129(1)(r), Florida Statutes, is a continuing offense that is not completed until the judgment is satisfied. See Haupt

v. State, 499 So. 2d 16, 17 (Fla. 2d DCA 1986).

60. According to Rule 61G4-17.001(23), Florida Administrative Code, "[f]or purposes of Section 489.129(1)(r), F.S., 'reasonable time' means ninety (90) days following the entry of a civil judgment that is not appealed."<sup>6</sup>

61. A contractor may not defend against a charge of failing to satisfy an unappealed civil judgment (in violation of Section 489.129(1)(r), Florida Statutes) by challenging the correctness or the validity of the judgment. See The Florida Bar v. Onett, 504 So. 2d 388, 389 (Fla. 1987); The Florida Bar v. Vernell, 374 So. 2d 473, 475 (Fla. 1979); Department of Health and Rehabilitative Services v. Wood, 600 So. 2d 1298, 1300 (Fla. 5th DCA 1992); McGraw v. Department of State, Division of Licensing, 491 So. 2d 1193, 1195 (Fla. 1st DCA 1986).

62. A licensed contractor who "[f]ail[s] to satisfy within a reasonable time, the terms of a civil judgment obtained against the licensee, or the business organization qualified by the licensee, relating to the practice of the licensee's profession," is guilty of violating Section 489.129(1)(r), Florida Statutes, regardless of the licensee's ability to pay the judgment. The failure to pay need not be willful for there to be such a violation. Section 489.129(1)(r), Florida Statutes, was designed to protect the public against contractors who fail to meet their legal obligations, whether they have the financial ability to do so or not.

63. The foregoing statutory provisions are "in effect, . . . penal statute[s] . . . This being true the[y] must be strictly construed and no conduct is to be regarded as included within [them] that is not reasonably proscribed by [them]. Furthermore, if there are any ambiguities included such must be construed in favor of the . . . licensee." Lester v. Department of Professional and Occupational Regulations, 348 So. 2d 923, 925 (Fla. 1st DCA 1977); see also Whitaker v. Department of Insurance and Treasurer, 680 So. 2d 528, 531 (Fla. 1st DCA 1996)("Because the statute [Section 626.954(1)(x)4, Florida Statutes] is penal in nature, it must be strictly construed with any doubt resolved in favor of the licensee.").

64. An examination of the evidentiary record in the instant case reveals that the Department clearly and convincingly proved (primarily through the testimony of Webbe<sup>7</sup>) that the violations alleged in Counts I through V of the Administrative Complaint were committed and that these are violations for which Respondent should be held liable. Punitive action against Respondent is therefore warranted.

65. In determining the particular punitive action the Department should take against Respondent for having committed these violations alleged in the Administrative Complaint, it is necessary to consult Chapter 61G4-17, Florida Administrative Code, which contains the Board's "disciplinary guidelines." Cf.



Williams v. Department of Transportation, 531 So. 2d 994, 996

(Fla. 1st DCA 1988)(agency required to comply with its disciplinary guidelines when taking disciplinary action against its employees).

66. Rule 61G4-17.001, Florida Administrative Code, provides, in pertinent part, as follows:

Normal Penalty Ranges. The following guidelines shall be used in disciplinary cases, absent aggravating or mitigating circumstances and subject to the other provisions of this Chapter. . . .

(8) 489.129(1)(h): Mismanagement or misconduct causing financial harm to the customer. First violation, \$750 to \$1,500 fine and/or probation; repeat violation, \$1,500 to \$5,000 fine and/or probation, suspension, or revocation. . . .

(11) 489.129(1)(k): Abandonment. First violation, \$500 to \$2,000 fine; repeat violation, revocation and \$5,000 fine. . . .

(14) Misconduct or incompetency in the practice of contracting as set forth in Section 489.129(1)(n), Florida Statutes, shall include, but is not limited to:

(a) Failure to honor a warranty.

(b) Violation of any provision of Chapter 61G4, Florida Administrative Code, or Chapter 489, Part I, F.S.

(c) Failure to abide by the terms of a mediation agreement.

(d) The following guidelines shall apply to cases involving misconduct or incompetency in the practice of contracting, absent aggravating or mitigating circumstances:

1. Misconduct by failure to honor warranty. First violation, \$500 to \$1,000 fine; repeat

violation, \$1,000 to \$2,000 fine and/or probation, suspension, or revocation.

2. Violation of any provision of Chapter 61G4, Florida Administrative Code, or Chapter 489, Part I, F.S. First violation, \$500 to \$1,000 fine; repeat violations \$1,000 to \$5,000 fine and/or probation, suspension or revocation.

3. Any other form of misconduct or incompetency. First violation, \$250 to \$1,000 fine and/or probation; repeat violations \$1,000 to \$5,000 fine and/or probation, suspension or revocation. . . .

(16) 489.129(1)(p): Proceeding on any job without obtaining applicable local building department permits and/or inspections.

(a) Late permits. Contractor pulls permit after starting job but prior to completion of same and does not miss any inspections. First violation, \$100 fine; repeat violation, \$500 to \$1,000 fine.

(b) Failure to call for inspections. First violation, \$100 fine; repeat violation, \$500 to \$2,500 fine and probation, suspension, or revocation.

(c) Job finished without a permit having been pulled, or no permit until caught after job, or late permit during the job resulting in missed inspection or inspections. First violation, \$500 to \$1,500 fine; repeat violation, \$1,000 to \$2,500 fine and/or probation, suspension, or revocation. . . .

(18) Failure to satisfy a civil judgment obtained against the licensee or the business organization qualified by the licensee within a reasonable time. First violation, \$500 to \$1,000 fine and/or proof of satisfaction of civil judgment; repeat violation, \$1,000 to \$5,000 fine and/or proof of satisfaction of civil judgment, probation, suspension or revocation. . . .

(20) For any violation occurring after October 1, 1989, the board may assess the costs of investigation and prosecution. The assessment of such costs may be made in addition to the penalties provided by these guidelines without demonstration of aggravating factors set forth in rule 61G4-17.002.

(21) For any violation occurring after October 1, 1988, the board may order the contractor to make restitution in the amount of financial loss suffered by the consumer. Such restitution may be ordered in addition to the penalties provided by these guidelines without demonstration of aggravating factors set forth in rule 61G4-17.002, and to the extent that such order does not contravene federal bankruptcy law. . . .

(23) . . . . The Board will consider a mutually agreed upon payment plan as satisfaction of such a judgment so long as the payments are current.

67. "Repeat violation," as used in Chapter 61G4-17, Florida Administrative Code, is described in Rule 61G4-17.003, Florida Administrative Code, as follows:

(1) As used in this rule, a repeat violation is any violation on which disciplinary action is being taken where the same licensee had previously had disciplinary action taken against him or received a letter of guidance in a prior case; and said definition is to apply (i) regardless of the chronological relationship of the acts underlying the various disciplinary actions, and (ii) regardless of whether the violations in the present or prior disciplinary actions are of the same or different subsections of the disciplinary statutes.

(2) The penalty given in the above list for repeat violations is intended to apply only to situations where the repeat violation is of a different subsection of Chapter 489 than the first violation. Where, on the other

hand, the repeat violation is the very same type of violation as the first violation, the penalty set out above will generally be increased over what is otherwise shown for repeat violations on the above list.

68. Rule 61G4-17.005, Florida Administrative Code, provides that "[w]here several of the . . . violations [enumerated in Rule 61G4-17.001, Florida Administrative Code] shall occur in one or several cases being considered together, the penalties shall normally be cumulative and consecutive."

69. The aggravating and mitigating circumstances which are to be considered before a particular penalty is chosen are listed in Rule 61G4-17.002, Florida Administrative Code. They are as follows:

- (1) Monetary or other damage to the licensee's customer, in any way associated with the violation, which damage the licensee has not relieved, as of the time the penalty is to be assessed. (This provision shall not be given effect to the extent it would contravene federal bankruptcy law.)
- (2) Actual job-site violations of building codes, or conditions exhibiting gross negligence, incompetence, or misconduct by the licensee, which have not been corrected as of the time the penalty is being assessed.
- (3) The severity of the offense.
- (4) The danger to the public.
- (5) The number of repetitions of offenses.
- (6) The number of complaints filed against the licensee.
- (7) The length of time the licensee has practiced.

(8) The actual damage, physical or otherwise, to the licensee's customer.

(9) The deterrent effect of the penalty imposed.

(10) The effect of the penalty upon the licensee's livelihood.

(11) Any efforts at rehabilitation.

(12) Any other mitigating or aggravating circumstances.<sup>8</sup>

70. Having considered the facts of the instant case in light of the provisions of Chapter 61G4-17, Florida Administrative Code, it is the view of the undersigned that the appropriate punitive action to take against Respondent in the instant case is to require him to: (a) pay a fine in the amount of \$4,500.00; (b) submit proof of satisfaction of the Final Judgment entered against him in Dade County Court Case No. 95-9669 CA 01; and (c) reimburse the Department for all reasonable costs associated with the investigation that led to the filing of the charges set forth in the Administrative Complaint<sup>9</sup> and for all reasonable costs associated with its successful prosecution of these charges.<sup>10</sup>

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department issue a final order (1) finding Respondent guilty of the violations alleged in all five counts of the Administrative Complaint, and (2) disciplining

Respondent for having committed these violations by requiring him to: (a) pay a fine of \$4,500.00; (b) submit proof of satisfaction of the Final Default Judgment entered in Dade County Court Case No. 95-9669 CA; and (c) reimburse the Department for all reasonable costs associated with the Department's investigation and prosecution of the charges set forth in the Administrative Complaint.

DONE AND ENTERED this 24th day of November, 1997, in Tallahassee, Leon County, Florida.

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STUART M. LERNER  
Administrative Law Judge  
Division of Administrative Hearings  
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1230 Apalachee Parkway  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 24th day of November, 1997.

#### ENDNOTES

<sup>1</sup> The hearing was originally scheduled to commence on July 23, 1997, but was continued, at Respondent's request.

<sup>2</sup> This finding is based on Webbe's testimony concerning the matter, which the undersigned finds more believable than Respondent's testimony to the contrary.

<sup>3</sup> The complaint had erroneously alleged that the Contract price was the full amount of the Settlement Check, rather than said amount, less \$5,000.00.

<sup>4</sup> Moreover, the repair work that ANAC has done has not been done entirely to Webbe's satisfaction.

<sup>5</sup> Respondent testified that he returned \$30,000.00 to Webbe shortly after depositing the Settlement Check in ANAC's account. This testimony, which is not supported by any documentary evidence, has been rejected because it is less credible than Webbe's testimony to the contrary.

<sup>6</sup> Because it merely clarified existing law (by defining the term "reasonable time," as used in Section 489.129(1)(r), Florida Statutes), Rule 61G4-17.001(23), Florida Administrative Code, may be applied in cases where the alleged violation of Section 489.129(1)(r), Florida Statutes, occurred prior to its [Rule 61G4-17.001(23)]'s effective date. Cf. Agency for Health Care Administration v. Associated Industries of Florida, Inc., 678 So. 2d 1239, 1256 (Fla. 1996) ("The law is clear in this state that there can be no retroactive application of substantive law without a clear directive from the legislature. However, procedural provisions and modifications for the purposes of clarity are not so restricted."); Nussbaum v. Mortgage Service America Company, 913 F. Supp. 1548, 1557 (S.D. Fla. 1995) ("A new rule intended to clarify or apply the law to a new factual setting does not constitute a substantive change in the law. A rule meant to clarify an unsettled area of the law does not change the law, but rather clarifies 'what the law according to the agency is and has always been,' and 'is no more retroactive in its operation than is a judicial determination construing and applying a statute to a case in hand.'")

<sup>7</sup> There is no "rule that a single witness's testimony can never provide clear and convincing evidence that a licensing or practice act has been violated." Werner v. Department of Insurance and Treasurer, 689 So. 2d 1211, 1213 (Fla. 1st DCA 1997).

<sup>8</sup> A licensee's penalty may not be increased beyond the "normal penalty ranges" based upon acts of misconduct that are not alleged in the administrative complaint. See Klein v. Department of Business and Professional Regulation, 625 So. 2d 1237, 1238-39 (Fla. 2d DCA 1993); Bernal v. Department of Professional Regulation, Board of Medicine, 517 So. 2d 113, 114 (Fla. 3d DCA 1987), approved, 531 So. 2d 967 (Fla. 1988).

<sup>9</sup> Pursuant to Rule 61G4-12.018, Florida Administrative Code, the Department is required

to submit to the Board an itemized listing of all costs related to investigation and prosecution of an administrative complaint when said complaint is brought before the Board for final agency action.

Fundamental fairness requires that the Board provide a respondent with an opportunity to dispute and challenge the accuracy and/or reasonableness of the Department's itemization of investigative and prosecutorial costs before determining the amount of costs a respondent will be required to pay.

<sup>10</sup> The undersigned disagrees with the suggestion made by the Department in its proposed recommended order that there is reason to deviate from the "normal penalty ranges" in the instant case and revoke Respondent's license. The Department has not shown that the circumstances surrounding Respondent's violations are significantly more "aggravating" than those which are typically present when a contractor engages in the type of misconduct in which it has been alleged and proven Respondent has engaged.



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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.